

# DOES METHOD REALLY MATTER? RECONSIDERING THE ROLE OF COMMON- LAW REMEDIES IN THE EVICTION PARADIGM

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## 1 Introduction

The new constitutional dispensation brought with it (inevitably) large scale deviations in the way remedies in the context of evictions are applied in modern South African law. The problem that is particularly interesting – especially in light of recent jurisprudence – is the extent, if any, to which remedies are applied in the same way as they were before the Constitution of the Republic of South Africa, 1996 (“the Constitution”) was enacted, especially in instances where constitutional rights are infringed and an appropriate remedy is sought. The question that seems to have become relevant is whether there is – or *should be* – a methodological approach in determining the decision of which remedy to apply for to ensure that constitutional rights are adequately given effect to. This has become especially important in instances where more than one remedy deriving from different sources of law could apply in a particular case. Are litigants then free to choose common-law remedies in instances where (constitutional) rights are infringed, and in response to that, are courts able to deny those remedies and rather create constitutional ones instead? It has always been crucial to consider the place (or role) of common-law remedies in a constitutional dispute. Additionally, it has become essential to determine the possibility of direct reliance on a constitutional right (to create a remedy) in applications brought purely on the basis of common-law remedies.

One place where the questions raised above are particularly interesting is in the area of eviction law. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) was enacted to give effect to the constitutional right not to be arbitrarily evicted from one’s home.<sup>1</sup> The Act ensures that procedural requirements are met in the case of eviction of unlawful occupiers.<sup>2</sup> PIE also guarantees substantive safeguards over and

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<sup>1</sup> See JM Pienaar & A Muller “The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework” (1999) 10 *Stell LR* 370-396, which highlights that although PIE adequately addresses the prevention of the illegal eviction in terms of s 26(3), it does not fulfil its purpose of ensuring the prevention of unlawful occupation of land and homelessness. See also JM Pienaar & H Mostert “Uitsettings onder die Suid-Afrikaanse Grondwet: Die Verhouding tussen artikel 25(1), artikel 26(3) en die Uitsettingswet” (2006) *TSAR* 277 283, where the authors question the role and function of the Act. They consider the purpose of the Act in terms of the aims as set out in the Act itself, but also with regard to various cases that have tried to provide clarity in terms of the main purposes of the Act.

<sup>2</sup> AJ van der Walt *Property in the Margins* (2009) 148.

above the procedural controls.<sup>3</sup> Unfortunately, what has been on the increase lately is municipalities evicting (or attempting to evict) unlawful occupiers without following the procedures as set out in PIE. This was not at all an uncommon occurrence in the pre-constitutional era, where “the tendency by the municipalities of the time was to deliberately destroy the building materials so as to prevent the use of the *mandament van spolie* in these instances”.<sup>4</sup> One would have thought that evictions of this nature would become a thing of the past under the constitutional dispensation, especially given section 26(3) of the Constitution and PIE.<sup>5</sup> However, what has surfaced lately are large scale suspect evictions effected by municipalities without the necessary procedures having been followed. My specific concern in these instances is the possible remedies that may be triggered (and available to evictees) when an infringement of this nature occurs.

In an earlier publication, Pienaar and I highlighted the continued relevance of the common-law remedy of the *mandament van spolie* in eviction cases.<sup>6</sup> We specifically noted how ironic it was that we still see common-law remedies being resorted to in order to highlight the predicament of the homeless and vulnerable, despite section 26(3) of the Constitution and the fact that PIE was specifically enacted to give effect to the right not to be arbitrarily evicted from your home.<sup>7</sup> Our first conclusion was that it is clear from pre-constitutional jurisprudence that the spoliation remedy was regularly used following evictions to restore possession and effectively return people to their homes and shelters. However, where the building materials with which the homes were erected were destroyed, the applicants sometimes ran into difficulties with the applicability of the remedy. Nonetheless, to a large extent issues like homelessness and vulnerability were brought to the fore when courts

<sup>3</sup> See Van der Walt *Property in the Margins* 149, who states that “[t]he substantive requirements identify the social and political background of the housing shortage and the social and personal circumstances of the occupiers as factors that have to be considered before an eviction order is granted, thereby indicating that the Act brings about a significant qualification for the rights paradigm”. See also JM Pienaar *Land Reform* (2013) ch 10 (forthcoming).

<sup>4</sup> ZT Boggenpoel & JM Pienaar “The Continued Relevance of the *mandament van spolie*: Recent Developments relating to Dispossession and Eviction” (2013) *De Jure* 998 1012:

“The 1977 Amendment to PISA further strengthened the position of local authorities, in that it precluded claimants from applying for civil remedies in response to demolitions of buildings or structures or the removal of materials or contents from the structures, unless the claimants could prove lawful title or a right to the land. This severely limited the courts’ power to grant the *mandament van spolie* in favour of unlawful occupiers whose properties were seized upon and destroyed. It is thus clear that the link between dispossession and eviction and subsequent possessory remedies and statutory responses thereto has been part-and-parcel of the South-African landscape for many years.”

<sup>5</sup> The Prevention of Illegal Squatting Amendment Act 72 of 1977 (“PISA”). Blecher writes that this legislative intervention was a “swift and harsh” intervention by the legislative authority in response to *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K). See MD Blecher “Spoliation and the Demolition of Legal Rights” (1978) 95 *SALJ* 8 13. In this regard, the tendency by the municipalities of the time was to deliberately destroy the building materials so as to prevent the use of the *mandament van spolie* in these instances. The 1977 Amendment to PISA (s 3B(4)(a)) further strengthened the position of local authorities, in that it precluded claimants from applying for civil remedies in response to demolitions of buildings or structures or the removal of materials or contents from the structures, unless the claimants could prove lawful title or a right to the land. This severely limited the courts’ power to grant the *mandament van spolie* in favour of unlawful occupiers whose properties were seized upon and destroyed.

<sup>6</sup> Boggenpoel & Pienaar (2013) *De Jure* 998-1021.

<sup>7</sup> 998-1021.

were forced to engage with claims for restoration following dispossession, which otherwise may never have been considered in the presence of the then applicable law regulating unlawful occupation of land, namely the Prevention of Illegal Squatting Act 52 of 1951 (“PISA”). Secondly, we showed that even despite section 26(3) and PIE, litigants in the constitutional era are still seeking common-law relief to bring the same issues of homelessness and vulnerability to the fore. In this regard, it was concluded that not much has changed and that consequently the remedy is still relevant in some instances in so far as it shows the plight of vulnerable occupiers who are unlawfully evicted by various acts of dispossession. In light of the fact that PIE by its very nature is a reactive legislative tool for ensuring constitutionally compliant evictions, PIE arguably presents shortcomings that in effect provide limited remedial options for unlawful occupiers if PIE is not pleaded *ex ante*. As a result, litigants are forced to resort to common-law remedies to obtain restoration of their homes in instances where PIE procedures were disregarded. The purpose for recalling that publication here is that it has provided the platform for engaging in another series of important questions concerning the source of law that provides remedial response for constitutional infringements. Therefore, I will use some of the cases in the eviction context – that were specifically highlighted in that publication – as the starting point to the issue I wish to discuss in this article.

It will first be necessary to briefly recap some decisions that have necessitated the questions that I have raised above. These cases (dealing with evictions or purported evictions) illustrate the need to critically determine whether a new methodology is required in the case of remedies in modern South African law. Therefore, the first part below sets out two decisions with the aim of analysing how each respective court went about dealing with the relationship between the common law and the Constitution as far as remedies are concerned. It is clear that in both instances the respective appellants had a choice between either instituting a common-law remedy or relying directly on a constitutional right to found a remedy. The reason for using these decisions is to specifically focus on instances where the possibility arose that more than one source of law could provide a remedy in the particular case.<sup>8</sup> It is interesting to see which remedy the parties opted for and also to observe how the particular court went about dealing with the interplay between the sources of law in the quest for an appropriate remedy.

Thereafter, I set out the constitutional provisions that aim to provide clarity in terms of the source of law that should be used when attempting to find redress in the case of infringement of constitutional rights. The penultimate part of the article provides selected perspectives on remedies for violations of constitutional rights, especially in view of the body of common-law remedies that seemingly coexist with the new cures provided by the Constitution. The need to find appropriate remedial responses in these situations has

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<sup>8</sup> I recognise that there may be more cases that illustrate the same point; however, for present purposes the discussion of these cases suffices because my point can be made just as well by only focusing on these two decisions.

been emphasised by many authors. Some views, perceptions and “angles of approach”<sup>9</sup> are discussed in this part with the aim of determining whether it is necessary to rethink the way we approach remedies in light of the Constitution. Incorporated in the discussion are some cases that indicate a vision of a move towards establishing an approach to remedies for constitutional infringement. These cases were specifically selected because they seem to provide an implicit – if not direct – vision for the way remedies should currently be approached and decided in view of the Constitution.

Finally, I attempt to provide some thoughts on the possible way forward as far as remedies are concerned. Specifically, I question whether common-law remedies – specially the *mandament van spolie* – can still play a valuable role in responding to illegal evictions, or whether direct reliance on a constitutional remedy in terms of section 26(3) of the Constitution provides better protection to evictees. In my view, this reflection is critical if we are to ensure that the project of “the achievement of equality, democracy and social justice envisaged by the Constitution”<sup>10</sup> remains more than mere rhetoric in the case of eviction of unlawful occupiers.

## 2 Some examples highlighting the problem

In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*<sup>11</sup> (“*Tswelopele*”), the Supreme Court of Appeal (“SCA”) had to deal with the application for a common-law remedy (the *mandament van spolie*) in instances where constitutional rights were infringed. In this decision, occupiers of a vacant piece of land in a Pretoria suburb were evicted from their homes and their homes were demolished. It was clear that the peremptory eviction proceedings in PIE were not followed. The appellants (as their choice of remedy) opted for restoration of possession of their homes in terms of the common-law spoliation remedy and for provision of temporary shelter to the destitute occupiers in terms of their rights under sections 25 and 26(3) of the Constitution. Therefore, *Tswelopele* provides an interesting combination of the common-law remedy (the *mandament van spolie*), the constitutional right violated (being section 26(3)) and the legislation (PIE) specifically enacted to give effect to the constitutional right. This makes methodological analysis from the perspective of remedies interesting.

The High Court held that the *mandament* was appropriate only for restoration of possession and not for rebuilding of the demolished structures. Similarly, the SCA doubted whether the common law spoliation remedy was available in cases where officials had – during an (illegal) eviction – destroyed the materials that were used in the construction of the dwellings. In this

<sup>9</sup> This phrase is used by André van der Walt in his development of the subsidiarity principles that aim to indicate the point of departure that should be used when deciding which source of law to turn to when a dispute arises. For the use of the phrase in this context, see AJ van der Walt *Property and Constitution* (2012) 37. However, the term comes from a novel by NS Ndebele *The Cry of Winnie Mandela* (2003) 81-82, and was first used in the context of law by Henk Botha (H Botha “Refusal, Post-apartheid Constitutionalism” in K van Marle (ed) *Refusal, Transition and Post-apartheid Law* (2009) 34).

<sup>10</sup> FI Michelman “Expropriation, Eviction and the Gravity of the Common Law” (2013) 24 *Stell LR* 245 246.

<sup>11</sup> *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA).

regard, it was found that the main objective of the common-law remedy is to temporarily restore physical control and enjoyment of property and not its rebuilt equivalent.<sup>12</sup> Therefore, the SCA focused on the possessory nature of the spoliation remedy and in this light the possibility of using replacement materials to rebuild the occupiers' homes was specifically excluded in terms of the traditional application of the remedy.<sup>13</sup> The Court refused to permit the type of development that would allow for the remedy to be applicable in these instances, because that would force the common law – specifically the common-law remedies – *to perform a constitutional function*.<sup>14</sup> Therefore, the pivotal question in *Tswelopele* was whether it would be appropriate to develop an existing common-law remedy to give effect to constitutional rights and values, or whether it would be more suitable to produce a new remedy in terms of the Constitution.<sup>15</sup>

It is clear that what the unlawful occupiers wanted was reoccupation of their homes from which they were evicted – and which were demolished – without the municipality having followed lawful eviction proceedings. In order to achieve this, the appellants relied on the common-law spoliation remedy to force the municipality to place them in the same position they were in prior to the dispossession. However, the common-law remedy was denied because the homes were demolished and the remedy could not – according to the Court – be used in these instances. Moreover, the Court highlighted that the common-law remedy *could not be developed either* so that it could be applicable in these instances. Having decided that none of the existing remedies – including the *mandament van spolie* – provided the occupiers with suitable protection, the SCA was forced to skilfully construct a constitutional remedy. Accordingly, the case was decided on the basis of direct reliance on constitutional rights that were infringed because PIE was not followed.<sup>16</sup>

Van der Walt argues that this was a missed opportunity for the Court.<sup>17</sup> Although he is hesitant to criticise the outcome, he disapproves of the *Tswelopele* decision for the uncertainty that it causes with regard to remedies in general.<sup>18</sup> Van der Walt asserts that devising a new (constitutional) remedy was unnecessary and unfortunate in these circumstances, especially considering that the Court neglected to give any indication concerning the limits, scope or effects of the new remedy. Similarly, Sandra Liebenberg agrees that the “judgment does not provide general guidance on the types of considerations which should inform a judicial decision to give effect to a constitutional right

<sup>12</sup> Para 24.

<sup>13</sup> Para 24.

<sup>14</sup> Para 26.

<sup>15</sup> Para 26. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 338.

<sup>16</sup> It must be mentioned that very little in the case deals with the legislation itself, which is probably understandable considering that PIE does not actually provide a remedy in instances where illegal evictions result because its provisions are not followed.

<sup>17</sup> AJ van der Walt “Developing the Law on Unlawful Squatting and Spoliation” (2008) 125 *SALJ* 24-36.

<sup>18</sup> 35.

through the development of existing common-law remedies, or the crafting of an entirely new constitutional cause of action”.<sup>19</sup>

The specific (although implicit) vision of how remedies should be seen in relation to one another – as illustrated in *Tswelopele* – serves as an important flag if one wants to start engaging with questions of the (appropriate) relationship between the common law and the Constitution as far as remedies are concerned. Before I elaborate, it is worthwhile to first discuss another decision in which the interplay between the common-law remedy and the Constitution was again emphasised.

In the Constitutional Court decision of *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*<sup>20</sup> (“*Schubart Park*”), the Tshwane Metropolitan Municipality again expelled unlawful occupiers from a badly run-down and significantly deteriorated residential complex in Pretoria without following any eviction or evacuation laws. The residential complex is owned by the City of Tshwane, which initially rented the units of the complex to various occupiers, but during the period from 1999 (when the City became the owner of the complex) to 2011 (when the litigation in this matter began) the building had become severely dilapidated. Furthermore, the City was unaware of exactly who occupied the property. Accordingly, the City disconnected both the water and electricity supplies to the complex and the occupiers protested against the disconnection. These protests quickly erupted into violence and even resulted in a fire breaking out in one of the blocks of the complex. Consequently, the police and fire brigade officers removed some of the residents from the complex. Although legal representatives acting on behalf of the residents tried to negotiate with City officials to ensure for the return of the residents to the complex, the negotiations were unsuccessful and the occupiers brought an urgent application in the North Gauteng High Court for an order allowing them to reoccupy their homes in terms of the *mandament van spolie*. Therefore, comparable to the *Tswelopele* residents, the occupiers in *Schubart Park* sought restoration on the basis that they were *spoliated of possession* of their homes.<sup>21</sup> This application was dismissed.<sup>22</sup>

In the Constitutional Court the applicants again sought restoration on the basis of the spoliation remedy.<sup>23</sup> It is interesting that the occupiers – in a similar fashion to the appellants in the *Tswelopele* decision – elected to follow the route of the *mandament van spolie* to obtain repossession of their

<sup>19</sup> Liebenberg *Socio-Economic Rights* 338.

<sup>20</sup> 2013 1 SA 323 (CC).

<sup>21</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) para 22.

<sup>22</sup> Para 9. The following day the order concerning the provision of temporary arrangements was kept in place and parties were ordered to “take further steps in an attempt to reach agreement on unresolved issues”.

<sup>23</sup> Para 22.

homes.<sup>24</sup> It should be noted that the obstacle that arose in the application for the *mandament* in this case was different from that in the *Tswelopele* decision. In *Schubart Park* the residential complex was still standing after the eviction and the question of using alternative materials to restore possession was not an issue at all, which it was in *Tswelopele*.

However, the Constitutional Court in *Schubart Park* dismissed the application for the *mandament van spolie*. According to the Court, merely restoring possession of the residential complex – in terms of the common-law remedy – would not meet constitutional standards in light of section 26(3).<sup>25</sup> Hence, an order for restoration would allow the residents to return to the complex and possibly endanger their lives because of the assumed horrendous state of the building, which the Court was unwilling to order. Therefore, although both requirements for the spoliation remedy were in principle complied with in *Schubart Park*, the Court nonetheless refused to grant the remedy because *reoccupation of the homes was impossible as a result of the deteriorated and unsafe state of the complex*.<sup>26</sup>

What is interesting about *Schubart Park* – and also the place where I draw parallels with the *Tswelopele* decision – is the Court's reasoning as far as remedies are concerned. Firstly, the Court recognised that if the *mandament van spolie* was not the appropriate remedy – and if it could not be developed to be the appropriate remedy – the occupiers would be left without a remedy in a case where there was clearly an infringement of section 26(3) rights. In this regard, the Constitutional Court followed the approach adopted in *Tswelopele* and upheld the distinction between the spoliation remedy (with its possessory function and its being presumably unable to perform a constitutional one) and a remedy under section 38 of the Constitution aimed at ensuring appropriate relief in the case of constitutional infringement.

Froneman J stated that a spoliation order would only give the occupiers factual possession and possible return of the *status quo* and it would not in itself directly determine – or entrench – constitutional rights.<sup>27</sup> In this respect, the Court correctly emphasised that spoliation proceedings merely set the scene for the subsequent determination of (constitutional) rights in relation

<sup>24</sup> Pienaar and I argue that a possible reason for the choice of remedy in both cases may be twofold: In the first place the occupier might choose the *mandament van spolie* because it is a speedy remedy. Another possible reason is the fact that PIE is preventative rather than reactive. Therefore, PIE cannot in itself *ex post facto* remedy an eviction that was not undertaken lawfully; whereas the spoliation remedy is by its very nature reactive and restorative. Consequently, if someone has unlawfully dispossessed another, the possession should be restored *ante omnia*. See Boggenpoel & Pienaar (2013) *De Jure* 1018.

<sup>25</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) paras 22, 30. This is similar to *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA) para 26, where the SCA stressed that the common-law remedy should not be forced to perform a constitutional function.

<sup>26</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) para 19.

<sup>27</sup> Para 29. This is because the remedy is a temporary one that ensures that possession is restored before rights are considered. This is emphasised by the maxim of *spoliatus ante omnia restituendus est*, which forms the basis of the remedy. See J Taitz "Spoliation Proceedings and the 'grubby-handed' Possessor" (1981) 98 *SALJ* 36 40; DG Kleyn *Die mandament van spolie in die Suid-Afrikaanse Reg* LLD thesis University of Pretoria (1986) 300; CG van der Merwe *Sakereg* 2 ed (1989) 121.

to property.<sup>28</sup> Therefore, the spoliation remedy would not (and according to the Court, *could not*) vindicate the occupiers' rights in terms of section 26(3). Their rights were clearly infringed when eviction or evacuation proceedings were disregarded and therefore restoration of factual possession of the property on the basis of the spoliation remedy would not be *appropriate relief* according to section 38 of the Constitution. For that reason, even if the two requirements for the spoliation remedy were proven, it could not be granted.<sup>29</sup>

To sum up, it seems as though the Court was suggesting (probably correctly) that the common-law remedy could only do so much when evictions occur contrary to due process. It could only provide factual restoration; nothing more and nothing less. Certainly, the reasoning of the Court indicates that the common-law remedy could not provide the type of protection that the Constitution requires in these particular instances. However, if the Court stopped there – in other words just denying the common-law remedy – it would have allowed an outcome that would not adequately have given effect to section 26(3) of the Constitution.<sup>30</sup> This is especially so in light of the fact that PIE was not followed and none of the legislative mechanisms that allow for removal, evacuation or eviction of people from their homes was applied either.<sup>31</sup> Therefore, subsequent to finding that the common-law remedy was inadequate in both cases – because it could not provide apt constitutional protection in these instances (and I might add, *could not be developed to do so*) – the Court was forced to provide a constitutional remedy under section 38 in order to rectify the violations that had taken place because of the blatant disregard for eviction proceedings.

In both these decisions, the respective courts' emphasis on the need to find *adequate* redress in the case of violations of constitutional rights is striking. In this regard, it was always clear in both *Tswelopele* and *Schubart Park* that the courts were looking for a way to adequately remedy the harms that had taken place; the only question was which remedy would appropriately facilitate that.<sup>32</sup> What is remarkable is that both courts felt more comfortable

<sup>28</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) para 29. See also *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) 513H; Kleyn *Die mandament van spolie in die Suid-Afrikaanse Reg* 300-301, 395. Interestingly, in *Van Wyk v Kleynhans* 1969 1 SA 221 (GW) 224A-B, the Court emphasised that the parties will essentially determine what nature the order will take. In so far as the court decides the *mandament van spolie* dispute, the order will be permanent if the parties cannot reach agreement after the order or if there is no subsequent judgment on the merits. Therefore, according to the Court the parties decide what character the eventual *mandament van spolie* order will take.

<sup>29</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) paras 29-30.

<sup>30</sup> Paras 18, 34, 40.

<sup>31</sup> The legislation that the Court mentions that could have been used, but was not, include: PIE; the Disaster Management Act 57 of 2002 (specifically s 54); the National Building Regulations and Building Standards Act 103 of 1977 (specifically s 12 and reg A15); GN R 2378 in *GG* 127 of 12-10-1990; the City of Tshwane Metropolitan Municipality, Fire Brigade Services By-Laws, published under LAN 267 in *Gauteng Provincial Gazette* 42 of 09-02-2005 (specifically s 11(2)).

<sup>32</sup> In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA), the SCA stated:

“As counsel for the appellants pointed out, effective relief must be speedy, and it must address the consequences of the breach of their rights. The only way to achieve these aims is to vindicate the occupiers' salvage claim, and to require the respondents to re-create their shelters. The remaining question is the best route to that result.” See specifically, para 19.

to do so in terms of section 38 of the Constitution rather than applying or altering common-law remedies in line with its constitutional obligations as emphasised below.<sup>33</sup>

Interestingly, both *Tswelopele* and *Schubart Park* illustrate a point that Wim Trengove makes concerning the discretion that courts have in terms of remedies in line with their constitutional mandate. Trengove argues that “a court’s choice of remedy in the case where a fundamental right has been violated or threatened, is determined only by what is just, equitable and appropriate”.<sup>34</sup> Therefore, in principle a court has a wide discretion to determine, on the basis of justice, equity and appropriateness, what would be the most suitable remedy in the particular case. This is in line with the reasoning of the Court in *Schubart Park* in terms of which the remedy that is granted must meet constitutional remedial standards (in line with section 38), which a purely restorative finding (in terms of the spoliation remedy) could not do.

Trengove maintains that adjudication of constitutional rights – specifically socio-economic rights – requires the development of new and more effective remedies in light of the special features that typically accompany socio-economic adjudication.<sup>35</sup> However, he states that socio-economic rights are not unique and therefore they do not necessarily require unique remedies. Accordingly, there may be instances where “conventional remedies” may be used to ensure that rights are adequately given effect to, but courts may also have to be innovative and create novel remedies in order to ensure adequate enforcement of the rights in the Bill of Rights. He relies on the *dictum* of *Fose v Minister of Safety and Security*<sup>36</sup> where Ackermann J stated:

“In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly, in a country where so few have the means to enforce their rights through the courts, it is essential that on occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”<sup>37</sup>

An interesting recent illustration of the use of conventional remedies to ensure that socio-economic rights are given effect to is the decision of the Constitutional Court in *Motswagae v Rustenberg Local Municipality*

<sup>33</sup> See *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA) para 26; *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) para 29; Michelman (2013) *Stell LR* 259, where Michelman questions the conservatism of South African judges and lawyers when it comes to developing the common law in line with the Constitution.

<sup>34</sup> W Trengove “Judicial Remedies for Violations of Socio-economic Rights” (1991) 1 *ESR Review* 8 9.

<sup>35</sup> 1997 3 SA 786 (C).

<sup>37</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (C).

(“*Motswagae*”).<sup>38</sup> Here, the appellant sought an interdict,<sup>39</sup> but the case was clearly decided on the basis of section 26(3). In *Motswagae*, the applicants were occupants of state-owned land. The buildings on the land were neglected and the government was in the process of redeveloping the land in line with its constitutional obligations. However, this required that the housing that was currently on the land had to be demolished. The Municipality tried to negotiate with the community to redevelop the land, but they were unable to reach consensus concerning the proposed redevelopment. Negotiations about alternative accommodation were also unsuccessful. Consequently, the Municipality ordered the second respondent (a service provider) to commence with construction work on the land. This resulted in excavations right next to the first applicant’s home that left the foundations of her home exposed. The applicants applied for an interdict in the High Court, which was refused on the basis that they did not have a clear right as required for an interdict. Both the High Court and the Supreme Court of Appeal denied the applicants leave to appeal, which resulted in the application to the Constitutional Court.

The Constitutional Court held that the Municipality’s interference with the occupiers’ *peaceful and undisturbed occupation* of their homes without a court order caused infringement of section 26(3) of the Constitution.<sup>40</sup> In this regard, the eviction that resulted did not have to cause the occupiers to be expelled from their homes. The Court highlighted that any attenuation or obliteration of the incidents of occupation would be sufficient to constitute eviction, which would have to be lawful.<sup>41</sup> Interestingly, the Court noted that the offer of alternative accommodation by the Municipality was indicative of the extent of the interference that the construction works would have on the occupants’ rights to inhabit their homes peacefully.<sup>42</sup> Therefore, the Court granted the interdict on the basis that the applicants had the right to undisturbed and peaceful occupation of their homes in terms of section 26(3);

<sup>38</sup> 2013 2 SA 613 (CC).

<sup>39</sup> It is interesting that although the applicants sought an interdict, they could very well have sought the *mandament van spolie*, specifically considering the interesting use of the words “peaceful and undisturbed occupation” of the property as the right that the occupiers had for purposes of the first requirement for an interdict. See specifically *Motswagae v Rustenberg Local Municipality* 2013 2 SA 613 (CC) para 18. See also ZT Boggenpoel “Property Law” (2013) 1 *Juta’s Quarterly Review* para 2.2.1; AJ van der Walt “Constitutional Property Law” (2013) 1 *Juta’s Quarterly Review* para 2.2.

<sup>40</sup> *Motswagae v Rustenberg Local Municipality* 2013 2 SA 613 (CC) para 9. The uncharacteristic use of the words “peaceful and undisturbed occupation of homes” to describe the right that the occupiers have in terms of s 26(3) of the Constitution is noteworthy. These words are almost identical to the words “peaceful and undisturbed possession of property” which is commonly accepted as the first requirement for the spoliation remedy, which is interesting if one considers the debate concerning whether the *mandament van spolie* is available in instances of mere disturbances of property as opposed to total dispossession of property. See Van der Merwe *Sakereg* 148; JC Sonnekus “Eggenote, Medebesit en die Mandament van Spolie” (1978) 95 *SALJ* 217; JC Sonnekus “*Fredericks and another v Stellenbosch Divisional Council* 1977 3 SA 113 K” (1978) *TSAR* 168 169; MJ de Waal “*Naidoo v Moodley* 1982 4 SA 82 (T)” (1984) 47 *THRHR* 118; AJ van der Walt “Mandament van spolie – ‘n Interdik?” (1984) 10 *De Rebus* 478; Kleyin *Die mandament van spolie in die Suid-Afrikaanse Reg* 323-331. See also Pienaar v Matjhabeng Plaaslike Munisipaliteit (3883/2012) 2012 ZAFSHC 213 (22 November 2012) *SAFLII* <<http://www.saflii.org/za/cases/ZAFSHC/2012/213.html>> (accessed 25-02-2014).

<sup>41</sup> *Motswagae v Rustenberg Local Municipality* 2013 2 SA 613 (CC) paras 12-13.

<sup>42</sup> Para 15.

that they were suffering irreparable harm as a result of interference with that occupation; and that there were no alternative remedies available to them.<sup>43</sup>

This judgment is interesting when viewed from a remedial perspective. This decision again concerns an eviction from property in instances where proper procedure was not followed in order to adequately give effect to section 26(3). An interdict was sought and granted, which highlighted the infringement of the constitutional right. The Court found that the constitutional right not to be arbitrarily evicted from one's home is sufficient for purposes of the first requirement for an interdict – namely proof of a clear right.

This decision seems to be in line with an approach that advocates greater pioneering on the part of courts when it comes to remedies to defend constitutional rights. For instance, Liebenberg contends that courts should be innovative about the remedies that they adopt to protect socio-economic rights,<sup>44</sup> and suggests a number of remedies that may be implemented in order to ensure that these rights are adequately given effect to in terms of the Constitution.<sup>45</sup> In this context, she maintains that “innovative responses are required which incorporate, but also transcend, the traditional repertoire of private law remedies”.<sup>46</sup> Trengove makes the same arguments in this regard.<sup>47</sup> It seems as though this type of approach, which essentially ensures that the judiciary is entrusted with a wide discretion to ensure that socio-economic rights are effectively protected, would support the outcomes in both *Tswelopele* and *Schubart Park* in so far as the respective courts sought to adequately give effect to constitutional rights that were clearly infringed when eviction legislation was disregarded.

Liebenberg has made a compelling argument for a more active role for the judiciary in the exercise of aligning the private law doctrines and rules with the new normative value system underpinned by the Constitution.<sup>48</sup> She asserts that until the legal culture – which is grounded in the classical liberal tradition that advocates minimal state intervention and judicial interference – is freed from this bondage and focused towards the new value system reinforced by the Constitution, there will be methodological and ideological barriers that stand in the way of application of socio-economic rights to private law rules and doctrines.<sup>49</sup> Relying on Karl Klare<sup>50</sup> and Van der Walt,<sup>51</sup> Liebenberg argues that there is a disjuncture between the legal culture that dominates South African law and the normative value system grounded in the Constitution.<sup>52</sup> Accordingly, she maintains that this plays a role in the question of whether it would be appropriate to develop an existing common-law remedy in order to

<sup>43</sup> Para 18.

<sup>44</sup> See Liebenberg *Socio-Economic Rights* 75, where Liebenberg asserts that courts should be creative when seeking to remedy the defects causing constitutional infringement. Therefore, courts are not limited to striking down the legislation “once and for all”.

<sup>45</sup> Ch 8.

<sup>46</sup> 379.

<sup>47</sup> Trengove (1991) *ESR Review* 9.

<sup>48</sup> Liebenberg *Socio-Economic Rights* 375.

<sup>49</sup> 339-341.

<sup>50</sup> KE Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146-188.

<sup>51</sup> AJ van der Walt “Legal History, Legal Culture and Transformation in a Constitutional Democracy” (2006) 12 *Fundamina* 1-47.

<sup>52</sup> Liebenberg *Socio-Economic Rights* 340.

give effect to constitutional rights and values as opposed to developing a new remedy in terms of the Constitution.<sup>53</sup> Arguably, in her view, the only way to ensure that the ideals of the Constitution are fostered is through a more active role for the judiciary in ensuring that private law doctrines and rules are brought in line with the vision of transformative constitutionalism.<sup>54</sup>

If one considers decisions like *Tswelopele* and *Schubart Park* – and perhaps others like *Marlboro Crisis Committee v City of Johannesburg*<sup>55</sup> – it is clear that the concerns highlighted by Liebenberg are noteworthy. Perhaps it is time to *rethink* (and to the extent that we have done so, then we should *restate*) the role of common-law remedies in a constitutional dispute, especially because it is evident from cases like *Tswelopele* and *Schubart Park* that it is unclear when courts will develop an existing common-law remedy in line with the Constitution or rather produce a new constitutional remedy. This becomes even trickier in instances where legislation exists to ostensibly give effect to the rights, but probably does not adequately do so.<sup>56</sup> It would probably be wise to take a step back and rehearse some of the provisions in the Constitution that offer clarity in terms of the constitutional mandate on courts regarding the relationship between the common law and the Constitution when suitable remedies are sought. I deal with this aspect in the following part by setting out the provisions of the Constitution that are specifically relevant in the quest for finding proper remedies for constitutional infringement.

### 3 Constitutional provisions

The Constitution contains numerous provisions that may be of assistance when dealing with the question of the appropriate source of law in the case of remedies, where a constitutional right is infringed. As a starting point, section 2 provides that the “Constitution is the supreme law of the Republic” and that “all law or conduct inconsistent with it is invalid”.<sup>57</sup> Furthermore, the same section provides that obligations that are imposed by the Constitution must be fulfilled.<sup>58</sup> It is arguable that the *law* in place to regulate evictions – namely PIE – presents shortcomings in the eviction of unlawful occupiers that renders the legislation unconstitutional.<sup>59</sup> It may be in exactly these instances that a litigant is forced to pursue common-law remedies, because “[i]n light of PIE’s shortcomings in this context and the limited resources of unlawful

<sup>53</sup> 336.

<sup>54</sup> For the coining of the term and its original intended meaning, see Klare (1998) *SAJHR* 150. Klare elaborates that “[b]y transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”.

<sup>55</sup> (29978/12) 2012 ZAGPJHC 187 (7 September 2012) *SAFLII* <<http://www.saflii.org/za/cases/ZAGPJHC/2012/187.pdf>> (accessed 25-02-2014).

<sup>56</sup> Boggenpoel & Pienaar (2013) *De Jure* 1018.

<sup>57</sup> S 2 of the Constitution.

<sup>58</sup> S 2.

<sup>59</sup> Boggenpoel & Pienaar (2013) *De Jure* 1018. Although Pienaar and I do not investigate the constitutionality of PIE as a result of its shortcoming, we do discuss the likelihood that, as a result of its shortcoming, there may be instances where PIE fails to adequately provide the substantive and procedural safeguards required by s 26(3) of the Constitution.

occupiers generally, one sure way to force all role players to participate in a legal process, to be played out in a formal, legal forum, is to claim the *mandament van spolie*.<sup>60</sup> Furthermore, still with regard to section 2 of the Constitution, the *conduct* of a municipality when it evicts unlawful occupiers without due process is arguably outside the ambit of PIE and certainly is outside of such municipality's *obligations* as stipulated in section 152 of the Constitution.<sup>61</sup> In this regard, it is clear that local government has a constitutional obligation to ensure that they "react to and deal with evictions"<sup>62</sup> in a constitutionally compliant manner. For one, it means that steps taken in relation to the homeless must be reasonable;<sup>63</sup> and that the values enshrined in the Constitution should underscore evictions so that they take place in a humane way.<sup>64</sup>

Section 8 of the Constitution may also be helpful with the problem of identifying the appropriate source of law where remedies are concerned. Section 8(3) specifically deals with the application of a provision of the Bill of Rights and commands:

"When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation *does not give effect to that right*; and (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1)."<sup>65</sup>

Another important provision of the Constitution that can assist in understanding how the sources of law should be interpreted is section 38, which states that:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant *appropriate relief*, including a declaration of rights."<sup>66</sup>

Section 39 of the Constitution is another provision that is important in this regard. Section 39(2) requires that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

The final provision that is important when establishing appropriate remedies in light of the Constitution is section 172. The power of a court – specifically with regard to constitutional matters – is set out in this section. This provision

<sup>60</sup> Boggenpoel & Pienaar (2013) *De Jure* 1021.

<sup>61</sup> For a discussion of the duties and responsibilities of local government in the eviction of unlawful occupiers, see J van Wyk "The Role of Local Government in Evictions" (2011) 21 *PELJ* 49-83.

<sup>62</sup> 51. As Van Wyk points out, municipalities are obliged in terms of s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights; and in terms of s 10 to give effect to the human dignity of every person.

<sup>63</sup> *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 17.

<sup>64</sup> See Van Wyk (2011) *PELJ* 72.

<sup>65</sup> S 8(3) of the Constitution (emphasis added).

<sup>66</sup> S 38 (emphasis added). The provision goes further to stipulate:

"The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members." See s 38 of the Constitution.

is crucial when analysing the question of sources of law as they pertain to remedies. Section 172(1) states:

“When deciding a constitutional matter within its power, a court – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is *just and equitable*, including – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”<sup>67</sup>

It is clear that the matrix of provisions listed above provide a (constitutionally mandated) framework in terms of which the sources of law should be applied in order to ensure that an appropriate remedy for the infringement of constitutional rights is obtained. However, it is evident from the cases discussed in the preceding parts that the question concerning the appropriate source of law in instances where more than one remedy may be applicable in eviction law remains a thorny and unclear issue.

In light of the provisions listed above, a few observations are warranted with regard to evictions and the remedies that are ordinarily used in these instances. Firstly, despite the fact that section 2 demands that obligations listed in the Constitution should be fulfilled, municipalities are still evicting (or constructively evicting) occupiers in contravention of section 26(3). Secondly, notwithstanding section 8(3)(a), which instructs courts to *apply* or if necessary *develop* the common law if legislation does not exist to adequately give effect to a right in the Constitution, common-law remedies are neither being applied nor being developed in line with the Constitution in these particular instances. In this regard, it is clear that parties elect to proceed with common-law remedies in instances where constitutional rights are infringed. Interestingly, litigants opt to invoke the common-law remedies regardless of the fact that legislation has been enacted to give effect to the constitutional provision purportedly infringed. The third observation is that courts seem to be reluctant to engage in the exercise of considering the common-law remedies in light of, and in line with, the Constitution. What is clear is that courts will opt for direct reliance on a constitutional provision to found a remedy, rather than engaging with the more difficult task of establishing how the remedies should be seen in relation to one another; and when it should be possible (if at all) to advance sufficient arguments in favour of developing a common-law remedy to bring it in line with the Constitution. This is most pertinently illustrated in *Tswelopele*, where Cameron JA (as he then was) highlighted:

“I do not think that formulating an appropriate constitutional remedy *in this case* requires us to *seize upon a common law analogy* and force it to *perform a constitutional function*.”<sup>68</sup>

Statements like these illuminate the need to rethink the interplay between common-law remedies and constitutional ones when evictions happen without proper procedures. It forces us to ask important questions about the sustained relevance of common-law (or as Trengove puts it, *conventional*) remedies,

<sup>67</sup> S 172 (emphasis added).

<sup>68</sup> *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA) para 26 (emphasis added).

where constitutional rights are impacted.<sup>69</sup> The questions that I highlighted in the introductory paragraph become relevant in light of the above extract from *Tswelopele*: The question that seems to have become relevant is whether there is – or should be – a methodological approach in determining the decision of which remedy to apply for to ensure that constitutional rights are adequately given effect to. This has become especially important in instances where more than one remedy deriving from more than one source of law could apply in a particular case. Are litigants free to choose common-law remedies in instances where (constitutional) rights are infringed, and in response to that, are courts able to deny those remedies and rather create constitutional ones instead? It has become critical to consider the place (or role) of common-law remedies in a constitutional dispute. Additionally, it has become essential to determine the possibility of direct reliance on a constitutional right (to create a remedy) in applications brought purely on the basis of common-law remedies. In light of the statement made in *Tswelopele*, these questions require reconsideration of the way we approach remedies in instances where a public body neglects to follow the procedures set out in PIE.

Before I reflect on the importance of thinking about the way we approach remedies in contemporary South African law, I will highlight some views on the link between the sources of law. I also wish to turn to some decisions that have attempted to steer the question of the interplay between the sources of law (specifically with regard to remedies) in a particular direction. Both the judgments and the various observations emphasised are valuable when attempting to place common-law, statutory and constitutional remedies in perspective.

#### 4 Thinking about the way we approach remedies

A lot of what is done in property law (especially in relation to finding remedies for violations of rights) is essentially targeted at the stabilising role the discipline aims to fulfil in society.<sup>70</sup> In “Property Outlaws”, Peñalver and Katyal highlight that property law is essentially structured around this stability.<sup>71</sup> However, they also contend:

“[L]aw-breakers [including unlawful occupiers] have played integral roles in producing a system of property that is characterised by a complex and subtle contradiction: it is at once stable, perhaps even essentially so and yet this seemingly ordered system at the same time masks a pervasive but constructive instability that is necessary to prevent the entire edifice from becoming outdated.”<sup>72</sup>

<sup>69</sup> Boggenpoel & Pienaar (2013) *De Jure* 998-1021.

<sup>70</sup> EM Peñalver & SK Katyal “Property Outlaws” (2007) 155 *U Pa L Rev* 1095 1097.

<sup>71</sup> 1133.

<sup>72</sup> 1098. Interestingly, Peñalver and Katyal point out the “powerful, and at times ironic, role of the lawbreaker in the process of fostering the evolution of property”. For an interesting (law and economics) perspective of property outlaws, see LA Fennel “Order with Outlaws?” (2007) 156 *U Pa L Rev* 269 278. She writes that “[t]he work of refining property law to strike the right balance between access and exclusion is always ongoing, and Peñalver and Katyal skillfully show us that outlaws can offer useful, if unconventional, guidance”. Also in the context of outlaws, Van der Walt writes that “[t]o imagine the transformation that is visible only in refusal of this kind [refusal of shallow transformation], we need to think through, and past, and outside the law, visualising ways in which refusal can possibly make new law from the pain and courage of outlaws”. AJ van der Walt “Property and Refusal” in K van Marle (ed) *Refusal, Transition and Post-apartheid Law* (2009) 53.

In the South African context, Willis J (delivering a judgment on the potential eviction of a group of unlawful occupiers) remarked that reliability and predictability are central virtues in (property) law and therefore there is *only one* remedy for unlawful occupation, and that is eviction.<sup>73</sup> It is therefore not surprising that Van der Walt writes that “[e]viction is a powerful legal instrument: a remedy with which a landowner can enforce her superior right to exclusive possession against almost any occupier”.<sup>74</sup> Borrowing from Singer and Underkuffler, Van der Walt points out that the *presumptive power of ownership* is a central feature of the right to evict.<sup>75</sup> Although this may be the case, the *new normative framework underpinned by the Constitution* requires a *new paradigm* within which evictions are to take place.<sup>76</sup> The legislative framework (PIE) aims to incorporate the owner’s right to exclude (which is strengthened by section 25) and the interests of the unlawful occupiers not to be unlawfully evicted (as buttressed by section 26(3)).<sup>77</sup> Consequently, as Pienaar explains in the context of unlawful occupation and eviction, “[t]he ‘contravention paradigm’, which was founded on private ownership rights and controls and powers of Government, had [in terms of the constitutional intervention] been replaced by a human rights paradigm”.<sup>78</sup> The *new eviction paradigm*<sup>79</sup> (or *human rights paradigm*)<sup>80</sup> is further bolstered by Constitutional Court decisions that prescribe the manner in which evictions should take place in light of the Constitution.<sup>81</sup> Therefore, it is clear that in the new constitutional dispensation the “perspective of the outsider, the fringe dweller ... the weak and the marginalised”<sup>82</sup> is taken into consideration before summary eviction is ordered.

This new standard pertaining to evictions is for the most part accepted and confirmed by courts.<sup>83</sup> However, Michelman observes that “[q]uestions abound about whether the activities of South African courts, over these past eighteen years on the Constitution’s watch, have been fully hospitable to the achievement of equality, democracy, and social justice as envisaged by the

<sup>73</sup> *Emfuleni Local Municipality v Builders Advancement Services* CC 2010 4 SA 133 (GSJ).

<sup>74</sup> AJ van der Walt “Housing Rights in the Intersection between Expropriation and Eviction Law” in L Fox-O’Mahony & JA Sweeney (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-55.

<sup>75</sup> 55. See also JW Singer *Entitlement – The Paradoxes of Property* (2000) 3; LS Underkuffler *The Idea of Property: Its Meaning and Power* (2003) 65-70.

<sup>76</sup> Liebenberg *Socio-Economic Rights* 311-316.

<sup>77</sup> Preamble to PIE.

<sup>78</sup> Pienaar *Land Reform* ch 10 (forthcoming). Pienaar explains that whereas the owner’s rights in the *contravention paradigm* ordinarily (and automatically) trumped that of the unlawful occupiers’, that is not the case according to the (new) *human rights paradigm*.

<sup>79</sup> Liebenberg *Socio-Economic Rights* 338.

<sup>80</sup> Pienaar *Land Reform* ch 10 (forthcoming).

<sup>81</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC).

<sup>82</sup> Van der Walt “Property and Refusal” in *Refusal, Transition and Post-apartheid Law* 54.

<sup>83</sup> There are two decisions that I have come across where the approach to evictions in the new constitutional dispensation is questionable. See *Emfuleni Local Municipality v Builders Advancement Services* CC 2010 4 SA 133 (GSJ); *Marlboro Crisis Committee v City of Johannesburg* (29978/12) 2012 ZAGPJHC 187 (7 September 2012) SAFLII. See also A Walters “A Balancing Act between Owners and Occupants: Is PIE Constitutional?” (2013) 22 *De Rebus* 22-25, in which the author raised scepticism about PIE’s constitutionality.

Constitution”.<sup>84</sup> This is no doubt attributed to the fact that in certain instances faith in a “profoundly equal, profoundly democratic South African society” is contested because – as Michelman so aptly puts it – “[f]aith is one thing, practice is another, and the Constitution in practice can support our faith only insofar as *its juridical side* can and does work in harmony with *its substantive visionary side*”.<sup>85</sup> This is exactly the argument that Karl Klare previously made, when he pointed out:

“I identify a ‘disconnect’ between the Constitution’s transformative aspirations and the conservative character of South African legal culture. The claim is that, regardless of their political leanings, all participants within a legal culture are to some extent influenced and constrained by it to produce ideas and outcomes that are or might be different from the ideas and outcomes that would arise were they participants in a different or a more plural or conflictual legal culture. The descriptive point is that legal culture and socialisation constrain legal outcomes quite irrespective of the substantive mandates entrenched in the constitutions and legislation.”<sup>86</sup>

The points that Michelman and Klare raise would indeed be cause for concern if the type of analysis that focuses on determining whether unlawful occupiers who were illegally evicted are able to successfully rely on the *mandament van spolie*, deviates markedly from the vision of what the Constitution is supposed to substantively do for the holders of newly established constitutional rights. I make this contention on the basis of two arguments.

Firstly, where an illegal eviction has allegedly taken place, an application based on the spoliation remedy arguably shifts the analysis (and focus) away from the actual issue in these cases, which is that section 26(3) rights were violated when PIE proceedings were disregarded. I should add a qualification here; this is assuming that the violation of section 26(3) is in *no way* taken into consideration in the decision of whether to apply the remedy in light of the Constitution or to develop it to bring the remedy in line with the Constitution. Given *Tswelopele* and *Schubart Park*, the practise seems to be to leave the common law (remedy) “as is” and to rather look in the direction of the Constitution to establish a remedy. Therefore, in so far as the violation of section 26(3) is disregarded in purely *mandament van spolie* applications, one would probably have to approach the common-law remedy in this context with circumspection.<sup>87</sup>

Secondly, focusing on the two requirements for the *mandament van spolie* fails to adequately consider whether the remedy could actually give the unlawful occupiers what (we presume) they really wanted, which was suitable protection of constitutional rights. One concern in this regard is the extent to which the occupiers really *only* wanted temporary restoration of the property

<sup>84</sup> Michelman (2013) *Stell LR* 246.

<sup>85</sup> 245 (emphasis added).

<sup>86</sup> Klare (1998) *SAJHR* 151.

<sup>87</sup> This was emphasised clearly in the recent decision of *Marlboro Crisis Committee v City of Johannesburg* (29978/12) 2012 ZAGPJHC 187 (7 September 2012) *SAFLII*, which was brought purely on the basis of the *mandament van spolie* and decided on that basis as well. This was despite the fact that the applicants had contended that what had happened when the police removed the unlawful occupiers from the properties (and dismantled their shacks) was eviction. The respondents vehemently denied that eviction and demolition in terms of s 26(3) of the Constitution had occurred in terms of which PIE would have been applicable. See *Marlboro Crisis Committee v City of Johannesburg* (29978/12) 2012 ZAGPJHC 187 (7 September 2012) *SAFLII* para 26.

to the limited extent provided by (a narrow and very restricted reading of) the scope of the *mandament van spolie*; an approach often adopted by the courts when the remedy is employed in these circumstances.<sup>88</sup>

In light of the stifling effect that reliance on common-law remedies could have on the constitutional vision of how evictions should take place in the South Africa we currently live in, it is probably advisable to resist the “gravitational pull”,<sup>89</sup> towards common-law remedies in these instances before (and unless) two separate (but related) questions are settled. Arguably, the answer to these questions should determine whether common-law remedies ought to still be relevant in constitutional disputes.

The first question is the extent to which the legislation that regulates how evictions should take place in South Africa was *enacted to give effect to the constitutional right* not to be arbitrarily evicted from one’s home. Another important question is the extent to which the legislation (PIE) was *enacted to replace the common law*.

Regarding the first question, it is clear from the preamble of PIE that it was indeed enacted to give effect to section 26(3).<sup>90</sup> This is evident from the words: “and whereas no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances”.<sup>91</sup>

In terms of the question of whether PIE was enacted to replace the common law, the starting place should be section 4(1) of PIE, which prescribes that “[n]otwithstanding anything to the contrary in any law or the common law, the provisions of the section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier”. There are also instances where case law has provided clarity concerning the appropriate connection between the different sources of law in the case of remedies. For instance,

<sup>88</sup> It seems as though courts have generally been uncomfortable with applying the *mandament* to regain possession of unlawfully occupied property even though, in principle, *ius possidendi* is not required in terms of the remedy; this was even the case before the Constitution was enacted. In some instances, it was because it was impossible to restore possession when the property was destroyed. See Sonnekus (1978) *TSAR* 172; De Waal (1984) *THRHR* 118; DG Kleyn “Die mandament van spolie as Besitsremedie” (1986) 19 *De Jure* 1 10. For differing opinions, see AJ van der Walt “Nog eens *Naidoo v Moodley* – ‘n Repliek” (1984) 47 *THRHR* 429 435; Taitz (1981) *SALJ* 36; JE Scholtens “Law of Property (including mortgage and pledge)” (1996) *ASSAL* 221 222. There are also instances where the remedy’s requirements were simply applied in a restrictive fashion, effectively precluding the remedy’s application. For example, in *Marlboro Crisis Committee v City of Johannesburg* (29978/12) 2012 ZAGPJHC 187 (7 September 2012) *SAFLII*, the requirement of “peaceful and undisturbed possession” was required to be stable, which the unlawful occupiers were unable to prove. Consequently, the remedy could not be granted to give the occupiers relief for the unlawful conduct of the police who had neglected to follow PIE.

<sup>89</sup> See Michelman (2013) *Stell LR* 245 246 for the coining of this term in this context and for an exemplary (critical) account of the courts’ conservative impulse or *gravity* against questioning common-law doctrines and regimes. He states:

“My question points toward an inclination of lawyers to defer to the common law, including a reluctance of lawyers to conclude that the words of a statute, or of the Constitution, have actually meant to command a deviation from the common law.” (247)

See also FI Michelman “Comment: The Common Law as Baseline? (A Reading of the Judgments of the Supreme Court of Appeal of South Africa in the case of Minister of Minerals and Energy v Agri South Africa)” (2012) *SSRN* 12-40 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2155898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155898)> (accessed 01-09-2013), where he further develops his argument of the common law forming the *basis of justified expectation* against which all government action is measured to determine whether it is permissible.

<sup>90</sup> Van der Walt *Property in the Margins* 147, 151-153.

<sup>91</sup> See also Van der Walt *Property and Constitution* 41 (specifically n 68).

in *City of Cape Town v Rudolph*<sup>92</sup> (“*Rudolph*”), the Cape Provincial Division ruled that the *mandament van spolie* is not available to landowners who wish to evict unlawful occupiers.<sup>93</sup>

In *Rudolph*, the City of Cape Town applied for the *mandament van spolie* to regain possession of its property that was unlawfully occupied by the respondents. The Court emphasised that although the spoliation remedy is in principle also available to regain possession in the case of immovable property, the applicant municipality was not free to choose to invoke common-law remedies – specifically the *mandament van spolie* – to evict the unlawful occupiers because PIE was specifically enacted to regulate eviction law. Therefore, in instances where a local authority as the owner of immovable property wishes to restore possession of property, it is barred from using common-law remedies to do so. It must follow the measures set out in PIE to ensure that section 26(3) of the Constitution is adequately given effect to. This was recently confirmed in the Eastern Cape High Court decision of *Afzal v Kalim*<sup>94</sup> (“*Afzal*”), where Plasket J reiterated that an application for the *mandament van spolie* could be fatally defective if the provisions of PIE were applicable to the situation and an applicant nonetheless sought the common-law remedy of the *mandament van spolie* to ensure undisturbed possession of his home.

In *Afzal*, the applicant obtained an order for the *mandament van spolie* in the court *a quo* and wished to confirm that order in the Eastern Cape High Court. The respondent raised two defences against the application. Firstly, she argued that she and the applicant had reached an agreement concerning her return to the house,<sup>95</sup> and secondly the respondent argued that the application was fatally defective because the applicant neglected to follow the procedures of PIE in order to evict her.<sup>96</sup> With regard to the second defence, which is the one that is interesting for present purposes, Plasket J questioned whether the application for the spoliation remedy was fatally defective because of non-compliance with PIE.<sup>97</sup>

It was confirmed that proceedings as set out in PIE (specifically in section 4) should be followed in the case of eviction of unlawful occupiers. It was clear in *Afzal* that eviction proceedings were not followed by the applicant. Instead, he elected to seek the *mandament van spolie* to obtain undisturbed possession of the property. The Court examined whether this choice of remedy was permissible in light of the fact that what the applicant was really trying to do was to evict the respondent from the premises. On the basis of the precedent set in *Rudolph*, the Court in *Afzal* correctly emphasised that “the *mandament van spolie* cannot be used to circumvent the protection given to occupiers of

<sup>92</sup> 2004 5 SA 39 (C).

<sup>93</sup> *City of Cape Town v Rudolph* 2004 5 SA 39 (C).

<sup>94</sup> 2013 6 SA 176 (ECP).

<sup>95</sup> The first defence was based on a dispute of facts, which the Court dismissed because the respondent’s version of the fact that there was agreement between her and the applicant was, according to the Court, “palpably implausible, far-fetched and untenable”. See *Afzal v Kalim* 2013 6 SA 176 (ECP) para 17.

<sup>96</sup> Para 2.

<sup>97</sup> Para 21.

homes by PIE”.<sup>98</sup> The Court concluded that PIE was not applicable on the basis of the facts of the case because the respondent was unable to prove that the house was her home, even though she was the co-owner of it.<sup>99</sup> However, it is clear that the basis for the reasoning of the Court was that had PIE been applicable in the case, the application may indeed have been defective, as the application of the *mandament van spolie* would specifically be precluded because of the rule established in *Rudolph*.

As emphasised earlier, the *Rudolph* guideline instructs that in so far as PIE was specifically enacted to regulate a particular situation (namely, the eviction of unlawful occupiers), the owner is not able to invoke the spoliation remedy in order to achieve the same result. It should be noted that *Rudolph* was decided (and section 4(1) of PIE is written) primarily from the perspective of *the owner or person in charge wishing to evict*, and not from the perspective of *the evictee who has been unlawfully evicted*. This observation may change everything. However, I suggest that in so far as PIE was enacted to ensure that evictions take place in line with section 26(3), it simply must be assumed that the rule could find application regardless of whether the litigant is the person evicted (like in *Tswelopele* and *Schubart Park*) or the one wishing to evict (as illustrated in *Rudolph*). Consequently, it seems inevitable that the rule could apply to indicate a “fatally defective application” in (all) instances where a common-law remedy is sought if there is legislation specifically enacted to regulate a particular area of law.

It is clear that a similar type of rule already applies in the context of the relationship between the common-law remedy of the *rei vindicatio* and PIE. In this regard, Badenhorst, Pienaar and Mostert question the impact of the constitutional right not to be arbitrarily evicted from one’s home (section 26) and its concomitant legislation (PIE) on the common-law remedy of the *rei vindicatio*.<sup>100</sup> The authors highlight that the constitutional dispensation brought with it many questions concerning issues of applicability of different sources of law to eviction cases. They ask vital questions about the source of law applicable in the case of evictions, namely:

- “(a) When is the common law (*rei vindicatio*) applicable and when does one use the provisions of the Prevention of Illegal Eviction Act?
- (b) What is the impact of section 26(3) on the application of the *rei vindicatio*, if at all?
- (c) Which relevant circumstances have to be considered and whose responsibility is it to bring it to the attention of the court considering the eviction order?”<sup>101</sup>

Furthermore, it is suggested by these authors that:

“[O]ne would first have to determine when the provisions of the Prevention of Illegal Eviction Act are applicable. If the Prevention of Illegal Eviction Act and other legislation dealing with eviction are not applicable, then the common law would apply. One would then have to determine whether the

<sup>98</sup> Para 24.

<sup>99</sup> Para 28.

<sup>100</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The Law of Property* 5 ed (2006) 247.

<sup>101</sup> 247.

application of the *rei vindicatio* would be used in much the same way as it has been applied for the past decades before the Constitution commenced.”<sup>102</sup>

If one considers that “the aim of the Prevention of Illegal Eviction Act is to amend the common law”<sup>103</sup> in the sense that the common law is excluded as far as eviction is concerned, it is interesting to note the number of cases in which eviction orders are still granted without any reference to PIE.<sup>104</sup>

There are also other contexts in which the same type of guideline about the relationship between the sources of law, as shown in *Rudolph*, was illustrated. For instance in the context of administrative law, O’Regan J stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*<sup>105</sup> that in so far as the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was enacted to give effect to section 33 of the Constitution, litigants who seek to review administrative action should do so in terms of PAJA and not the common law.<sup>106</sup> Therefore, the case illustrates that claimants who wish to protect their rights in terms of section 33 of the Constitution should *not* do so in terms of the common-law remedy of judicial review, but rather through the legislation (specifically section 6 of PAJA) that was enacted to give effect to the constitutional right. This type of reasoning shows that in instances where legislation does exist, it should indicate the choice of remedy that the litigant invokes.<sup>107</sup>

In his review of the Constitutional Court decisions in the 2007 term, Van der Walt observed a pattern concerning the choice of the source of law when conflicts arise about a right.<sup>108</sup> He uses these observations to develop the subsidiarity theory, which consists of a set of principles aimed at providing a “structure [for] the choice of the source of law that is most likely to promote the development of a system of law that displays the desired features [of a single system of law] and that avoids the unwanted outcomes [illustrated when democracy is disregarded]”.<sup>109</sup> The principles are important to avoid what Karl Klare has subsequently described as “proliferate separate tracks or sub-systems of law ... grounded on the Constitution itself *and* on legislation or the common law”.<sup>110</sup> Van der Walt states:

<sup>102</sup> 247 (footnotes omitted). The discussion continues with a section on what PIE was enacted to do and achieve.

<sup>103</sup> 253; Van der Walt *Property in the Margins* 151 (“The Act explicitly overrides the common law right to evict and therefore one might expect that it would simply replace the common law”).

<sup>104</sup> For contrasting views on the relationship between the common law, PIE and s 26(3) of the Constitution, see *ABSA Bank Ltd v Amod* 1999 2 All SA 423 (W); *Brisley v Drotosky* 2002 4 SA 1 (SCA); *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA). See also Van der Walt *Property in the Margins* 152-153. See specifically Pienaar *Land Reform* ch 10 (forthcoming), in which Pienaar discusses a number of decisions in which PIE was ignored in the granting of an eviction order.

<sup>105</sup> 2004 4 SA 490 (CC). Van der Walt argues that the principle observed in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) in the context of administrative law could be used in instances where PIE is applicable to prevent direct application of common-law remedies. See AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77 104.

<sup>106</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 25.

<sup>107</sup> Van der Walt *Property and Constitution* 41.

<sup>108</sup> Van der Walt (2008) *CCR* 77-128.

<sup>109</sup> Van der Walt *Property and Constitution* 35. See also Van der Walt (2008) *CCR* 77-128.

<sup>110</sup> KE Klare “Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt” (2008) 1 *CCR* 129 134 (emphasis added).

“Subsidiarity should be understood in terms of its constitutional purpose and justification, as that has been spelled out in 2007: to preserve the constitutional power and obligation of the courts to control the constitutional validity of legislation, while at the same time paying due respect to the democratic power and legitimacy of policy makers and legislatures in giving effect to their reform obligations.”<sup>111</sup>

And again:

“[T]he subsidiarity principles should not be seen or used as restrictions upon constitutional review, interpretation of legislation or development of the common law; they indicate an *angle of approach*, a starting point for reflection, a methodological discipline to avoid arbitrary resort to established and comfortable ways of thinking and not a general avoidance of constitutional influence.”<sup>112</sup>

With this purpose in mind, the subsidiary principles can be explained as follows: The first principle provides that if legislation has specifically been enacted to give effect to a constitutional right, conflicts about the right should be adjudicated with reference to the legislation.<sup>113</sup> Direct reliance on the constitutional provision is therefore precluded.<sup>114</sup> However, direct reliance on a constitutional right is possible in instances where a litigant wishes to attack the constitutional validity of the legislation. The second subsidiarity principle requires that if legislation exists to give effect to a constitutional provision, parties should not be free to rely on the common law to bring their cause of action. Consequently, according to these principles, a litigant should not rely on the constitutional provision directly,<sup>115</sup> or on the common law to protect against infringement of the right, but should – where legislation exists – rely on that legislation to protect their constitutional rights.<sup>116</sup> With this set of subsidiarity principles – with its proviso – Van der Walt considers the proper relationship between three sources of law, namely the Constitution, legislation and the common law.

Interestingly in this regard, Michelman – who is very critical of South African judges and lawyers’ conservative approach to existing common-law doctrine – nonetheless concedes:

“In the case where a statutory path is open, if a court takes the common-law path instead, that to some degree wastes, while it also spurns and belittles, the parliamentary contribution. *Other things being equal* ... that seems obviously a bad thing to do.”<sup>117</sup>

Similarly, Liebenberg acknowledges that there are sound justifications for preferring legislation to do the job of adequately giving effect to socio-economic rights, but she is mindful of the practical limits that taint the legislative branch of government.<sup>118</sup> For that reason, she argues that where imperfect legislation exists because of these constraints, or where no legislation exists to protect

<sup>111</sup> Van der Walt (2008) *CCR* 126.

<sup>112</sup> Van der Walt *Property and Constitution* 37.

<sup>113</sup> 35-39.

<sup>114</sup> This principle was brought forth by the principle enunciated in the Constitutional Court decisions of *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) para 437.

<sup>115</sup> See Van der Walt (2008) *CCR* 100-103, where Van der Walt relies on *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52.

<sup>116</sup> See Van der Walt (2008) *CCR* 100-103, where Van der Walt relies on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 25.

<sup>117</sup> Michelman (2013) *Stell LR* 259 (original emphasis).

<sup>118</sup> S Liebenberg “The Application of Socio-economic Rights in Private law” (2008) *TSAR* 464 471.

socio-economic rights, “litigants must look to the court according to section 8(3) [of the Constitution] to find a remedy in terms of the existing common law or, where necessary, to develop a new constitutionally sourced remedy to give effect to the relevant constitutional rights”.<sup>119</sup>

In the case where PIE exists to replace the common law and give effect to section 26(3) rights, but for some reason does not adequately do so, I suggest that one would first have to look to the legislative branch to fix what needs to be mended. No doubt, the predicament concerning remedies as highlighted in the previous parts of the article certainly results from imperfect legislation aimed at regulating eviction law. Ideally, the *Rudolph*-guideline (as extended to evictees) would apply in the context of eviction law to ensure that because PIE was enacted to give effect to section 26(3) of the Constitution, litigants should rely on PIE in order to protect their constitutional right. Therefore, a complainant should not rely directly on section 26(3) or the common law to protect the right. However, the problem as indicated before is that PIE is commanding rather than responsive. Therefore, PIE cannot in itself *ex post facto* remedy an eviction that was not undertaken lawfully, because it provides no effective cure in instances where organs of state do not follow the procedures in terms of the legislation in order to evict the unlawful occupiers. There is of course section 8 of PIE, in terms of which criminal liability ensues in the case of non-compliance with the procedures of the Act; but this has never been argued or applied. As mentioned earlier, the conduct of an organ of state in instances where PIE proceedings were disregarded possibly falls outside of the ambit of the legislation and is *ultra vires*. The only way in which this conundrum will once and for all be solved (and will probably be the best solution in these instances) is if a litigant – in accordance with the proviso to the first subsidiarity principle highlighted by Van der Walt – attacks the validity of the legislation in so far as it does not adequately give effect to the constitutional right. An amended version of PIE is crucial so that the piece of legislation either incorporates stricter penalties in the case of non-compliance with its provisions, or provides clearer guidelines in terms of remedial response in instances of non-fulfilment of the obligations imposed by it. However, this is probably only a medium (or even long) term solution. In the meantime, it is clear that appropriate remedial response still needs to be found for the situation where illegal evictions are occurring.

The question is: Does it actually matter whether an evictee who was unlawfully evicted chooses the *mandament van spolie* or relies directly on section 26(3) to argue that a new remedy in terms of the Constitution should be created? From a practical perspective, it is hard to see how the result when invoking the *mandament van spolie* and the outcome in the case where a constitutional remedy under section 26(3) is argued, are in principle

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<sup>119</sup> 472.

any different from each other.<sup>120</sup> The spoliation remedy would arguably be invoked in these instances to simply place the occupiers in the position they were in prior to the unlawful dispossession. In doing so, questions relating to the merits of the dispute can be considered in later (lawful) eviction proceedings. In contrast, if one considers a constitutional remedy in terms of section 26(3), at best, this remedy should probably ensure that the illegal eviction is reversed and the occupiers are placed in a position whereby they can be subject to lawful eviction proceedings.<sup>121</sup> Therefore, the *mandament van spolie* would inevitably fulfil the same role as a constitutional remedy in terms of section 26(3).<sup>122</sup>

That being said, it is not so much the practical implications that are particularly worrying with these decisions; I am more concerned with the underlying theoretical ideology of the case law that I discussed. I think it (really) does matter whether claimants choose to apply for common-law remedies or opt for direct reliance on constitutional rights to found constitutional remedies. Similarly, it certainly matters whether courts deliberately choose not to develop the common-law remedies in line with the Constitution, but instead decide to devise new constitutional remedies that purportedly exist parallel to the extant common-law ones.

In the absence of a specific remedy in PIE designed to restore the situations where local authorities illegally evict without following the procedures in the Act, courts should be careful not to simply disregard the application of the *mandament* for practical reasons, like the destruction of the building materials or the fact that the building may be unsuitable for habitation. It should be possible (and it is in fact constitutionally mandated)<sup>123</sup> to develop the *mandament* to provide for the practical difficulties with applying the remedy in these instances. In this regard, I posit that it should be plausible to still keep

<sup>120</sup> It is important to note that the *mandament van spolie* would not be invoked in these instances to provide tenure security in the form of a permanent solution; in this regard, I recognise the inherent limitation to the *mandament*'s traditional application, especially in so far as the remedy is essentially temporary in nature and the merits of the dispute are irrelevant in the consideration of whether the remedy should be granted.

<sup>121</sup> This is probably also a temporary solution in the sense that the possibility still exists that an eviction order can be granted during subsequent lawful eviction proceedings. It is doubtful whether a remedy based on direct reliance on s 26(3) of the Constitution would in any event ensure any form of permanent tenure security, unless it is supplemented to some extent with s 26(1) and/or 26(2).

<sup>122</sup> There are, however, a few noteworthy remarks that should be made about the application of the *mandament vis-à-vis* the use of a constitutional remedy in terms of s 26(3) of the Constitution in this context. The merits of the dispute are irrelevant in *mandament van spolie* applications, whereas this restriction would not apply in the case of a s 26(3) constitutional remedy. This may mean that a broader spectrum of factors could be taken into consideration in terms of the constitutional remedy, which may perhaps be impermissible according to the *mandament van spolie*. However, it is not entirely clear which factors would be taken into consideration in order to decide whether a s 26(3) constitutional remedy should be granted. The onus of proof would presumably also be different depending on whether the *mandament* is sought as opposed to a constitutional remedy. Whereas possession and unlawful dispossession are the salient requirements in the case of the spoliation remedy, presumably one would have to prove illegal eviction from one's home (or demolition thereof) to be successful with a constitutional remedy according to s 26(3). An advantage that is of course applicable in the case of the *mandament* is the fact that it is a speedy remedy, which may be beneficial considering the illegal evictions from homes and the need for swift repossession. See *Mans v Marais* 1932 CPD 352 356.

<sup>123</sup> See part 3 above.

the *mandament van spolie* as the residuary source of law in the case where PIE falls short.

Where the *mandament van spolie* is not available in a particular case because of these practical difficulties, it is important to keep in mind that courts have a duty to remedy the situation through the development of the common law. Although it is impossible to determine beforehand when common-law remedies should be developed in line with the Constitution, the mandate is clear: there is a duty on courts to ensure that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.<sup>124</sup> If this mandate is followed more clearly and consistently, one can only hope that this results in court decisions that are more principled and consistent.

## 5 Conclusion

Much of what has been discussed in this contribution is largely dependent on those who have already tried to figure out how to effectively deal with the way in which the changeover to a truly democratic society would affect the way we approach remedies for infringements of constitutional rights. What has been particularly striking for me is how the various approaches to the sources of law – when it comes to remedial options – are riddled with “complexity, nuance, and multiple perspectives” instead of “the standard, sanitised, starry-eyed accounts of our constitutional transition”.<sup>125</sup>

I have tried to identify one area of law where these complexities and nuances are particularly telling. Specifically in eviction law, it is clear that the relationship between the sources of law is uncertain for purposes of finding a remedy in the case of infringements of section 26(3). Although it would be rash to criticise PIE and forget the important role that it fulfils in post-Apartheid eviction law, I have tried to illustrate that where PIE falls short it is important to take stock of what the shortfall means in terms of remedies for occupiers who are illegally evicted. If this does not happen, we may invariably run the risk of applying the remedies in an instinctual manner, without thinking about what the Constitution means – and in fact prescribes – for the way we seek to give adequate protection to the rights contained in the Bill of Rights.

I questioned whether the rule enunciated in *Rudolph* – requiring that in instances where PIE exists to give effect to section 26(3) of the Constitution, a municipality cannot evict by using the *mandament van spolie* – could be expanded to remedies in general; this could help to explain a certain methodological approach that would assist with understanding how remedies from different sources of law should be approached in the new constitutional dispensation. In the context of illegal evictions, I argue that it should be impermissible to bypass the issue of abuses of section 26(3) by elaborate (often technical) discussions of the two requirements of the spoliation remedy,

<sup>124</sup> S 39(2) of the Constitution.

<sup>125</sup> Botha “Refusal, Post-apartheid Constitutionalism” in *Refusal, Transition and Post-apartheid Law* 34.

especially if no possibility is foreseen that the remedy could be viewed (or developed) in line with the Constitution. In this regard, it is suggested that in light of the fact that courts generally are quite restrictive in their application of the *mandament van spolie* in these instances, it should first be established to what extent PIE *was meant to replace the common law* and *was enacted to give effect* to section 26(3). As illustrated, PIE was meant to fulfil both these purposes; therefore, the issue that should primarily have been questioned in *Tswelopele* and *Schubart Park* is the extent to which PIE falls short of its constitutional obligations, which may possibly require amendment.

To the extent that the legislation therefore does not adequately give effect to section 26(3) rights, in the interim the question still lingers concerning the use of the *mandament van spolie* by evictees who are unlawfully evicted. In the constitutional dispensation, the need to answer the question has perhaps been less pressing than in the pre-constitutional era because of the possibility of direct reliance on a constitutional right to found a remedy. The evictee arguably now has the possibility of two coinciding remedies, namely the *mandament van spolie* and a constitutional remedy under section 26(3). In this regard, I have tried to illustrate that both these remedies would in principle provide the same type of remedial content in the sense of ensuring that repossession takes place (thereby reversing the illegal eviction) so that the occupiers are (temporarily) placed in the position they were in prior to the illegal eviction (or dispossession) and the merits of the dispute can be decided in a subsequent eviction application. I argue that if we want to ensure that we have the types of decisions that give full effect to the rights as envisaged by the Constitution, we should not be too quick to discard of the possibility that the common-law remedy could be invoked in the context of eviction. If the need arises to reconsider the common-law remedies in light of the Constitution (and to develop them in line with the Constitution) courts are not able to shy away from their obligation in terms of section 39(2). In this regard, simply choosing a method out of instinct and without proper reflection is not an option. It may seriously undermine the transformative thrust of the Constitution and force us to really reflect on how we view the sources of contemporary South African law in relation to one another.

It is clear that it is necessary to understand (and better explain) how the sources of law relate to one another in the search for suitable remedies for infringement of constitutional rights. I have done no more than flag some important issues that to my mind should be considered before responding to illegal evictions. I have certainly not provided (and did not attempt to provide) details of how appropriate legislation should be drafted or what possible penalties may be considered sufficient to deter illegal evictions from taking place. In this regard, my aim was modest. I simply join a number of other voices that call for deeper consideration about the starting point in these instances, so as to ensure adequate protection for constitutional rights. Perhaps this will place much needed *method* back into the *madness* that is occurring in eviction law at the moment. A starting point or approach “enables you to imagine yourself in a situation without its details... [o]therwise details can

chew away at your options”,<sup>126</sup> or as Henk Botha so aptly reminds us; we should (perhaps) be:

“Resisting the temptation to plan everything ahead, to devise a strategy for every eventuality. Remaining alive to the possibility that things could be different. Savouring the passion of enormous possibility. And laughing at ourselves for the way in which, over time, our embrace of nuance, uncertainty and contradiction tends to solidify into new certainties, as the angle of approach hardens into full-blown strategies and programmes and imagination turns into inertia.”<sup>127</sup>

## SUMMARY

The new constitutional dispensation brought with it (inevitably) large scale deviations in the way remedies in the context of evictions are applied in modern South African law. This article examines how the sources of law relate to one another in the search for suitable remedies for infringement of constitutional rights. Specifically in eviction law, it is clear that the relationship between the sources of law is uncertain for purposes of finding a remedy in the case of infringements of section 26(3) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The evictee arguably has the possibility of two coinciding remedies, namely the *mandament van spolie* and a constitutional remedy under section 26(3). The article shows that both these remedies would in principle provide the same type of remedial content in the sense of ensuring that repossession takes place (thereby reversing the illegal eviction) so that the occupiers are (temporarily) placed in the position they were in prior to the illegal eviction (or dispossession) and the merits of the dispute can be decided in a subsequent eviction application. Nonetheless, it is argued that in order to ensure the types of decisions that give full effect to the rights as envisaged by the Constitution, courts should not be too quick to discard of the possibility that the common-law remedy could be invoked in the context of eviction. If the need arises to reconsider the common-law remedies in light of the Constitution (and to develop them in line with the Constitution) courts are not able to shy away from their obligation in terms of section 39(2).

<sup>126</sup> Ndebele *The Cry of Winnie Mandela* 81-82.

<sup>127</sup> Botha “Refusal, Post-apartheid Constitutionalism” in *Refusal, Transition and Post-apartheid Law* 34.